fact been deprived. So said the Federal Court in the case of *Yap Ami & Anor. v. Tan Hui Pang* [1982] 2 MLJ 316 at page 320.

Counsel for the defendants then argued that if RM700 per month for 16 years was awarded, that capitalised would amount to RM134,400 which if invested at a rate of 8% would produce a return of RM10,752 per annum which is more than the RM700 the plaintiff testified to receiving from the deceased. There was no evidence before me of the possibility let alone probability of investment at that rate of interest being available to the plaintiff and accordingly I disregarded the argument. Counsel for the defendants also submitted that there was the advantage of accelerated payment and that apart from accelerated payment the Court should take into consideration the likelihood of the cessation of payment by reason of the death of the plaintiff, the cessation or reduction of payment by the deceased probably having married and having his own family, the deceased himself dying early had he lived, the plaintiff's infant children dying early or growing up and becoming self supporting. The view I took was that all these matters have been taken care of in the amended legislation in the form of the multiplier being statutorily fixed and the statutory exclusion namely the prospect of earnings being increased at any period after the person's death.

In this case the damages were assessed according to the statutory formula contained within the 4 corners of the legislation and extraneous factors such as accelerated payment, prospects of marriage of the deceased, likelihood of cessation of dependency and so on, all which factors were taken as having been built into the statutory formula, were disregarded and accordingly I found that the loss of support suffered by the plaintiff to be RM750 per month and gave the plaintiff judgment accordingly with interest and costs.

LORI MALAYSIA BHD. & 4 ORS.

v.

LESLIE CHEDZOY & 3 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[SUIT NO. D4-22-1534-1991]
21 JUNE 1994

PRACTICE & PROCEDURE: Application by 1st defendant to set aside ex parte order for Anton Pillar, injunction and appointment of interim receivers - Allegation of material non-disclosure and misrepresentation - Whether further evidence can be introduced during inter partes proceedings to rectify deficiency during ex parte proceedings - Whether plaintiffs' affidavit was misleading - Whether ex parte order should be set aside - Consideration of balance of convenience and potential damage to plaintiffs.

This was an application by the 1st defendant to set aside an *ex parte* order of Court granting the plaintiffs an Anton Pillar order, an injunction and appointing interim receivers to manage the affairs of the 1st plaintiff.

The 3rd, 4th and 5th plaintiffs were the directors and majority shareholders of Technivest Sdn. Bhd., the 2nd plaintiff, which company had majority control of Lori Malaysia Bhd, the 1st plaintiff. The 1st plaintiff obtained loans from various financial institutions totalling RM30 million which loans were secured by *inter alia* the personal guarantees of the directors. The financial institutions demanded payment of the outstanding loan sum and sought to enforce the personal guarantees. In August 1991, in consideration of RM1 and an undertaking by the 1st defendant to restructure the 1st plaintiff and obtain the release of the 3rd, 4th and 5th plaintiffs from the guarantees the said plaintiffs entered into a sale and purchase agreement with the 1st defendant and handed over full control of the 1st and 2nd plaintiffs to him afterwhich they resigned as directors. Upon the 1st defendant's failure to comply with his obligations under the agreement the plaintiffs filed a suit against the defendants, the new directors.

On 19 November 1991 the plaintiffs applied *ex parte* and obtained an Anton Pillar order to enter the premises of the 1st and 2nd defendants and plaintiffs to search and remove all documents relating to the case, an injunction restraining the defendants from acting as or holding themselves out as directors of the 1st

defendant and from interfering with the management of the same and an order appointing an interim receiver to manage the affairs of the 1st plaintiff. Counsel for the 1st defendant raised the issue of material non disclosure and misrepresentation and submitted that the plaintiffs were not entitled to have the order continued.

Held:

[1] With respect to the issue of non disclosure, the Court agreed with the principle laid down in the case of *Pan Asian Services Pte. Ltd v. European Asian Bank AG* [1989] 3 MLJ 385 @ 391 in which the Singapore Court of Appeal said that when an *ex parte* application for a Mareva injunction was made the applicant should make full and frank disclosure of all material facts. However further evidence could be introduced during the *inter partes* proceedings even if the evidence was available at the time of the *ex parte* application but was not presented to the Judge therein. In the appropriate case, the Judge hearing the *inter partes* case from the *ex parte* application could find that further evidence had rectified the earlier deficiency and refuse to discharge the *ex parte* order. Thus the Court ruled that whether the evidence was disclosed or not at the *ex parte* stage the Court would decide on the application based on all the evidence before it at the *inter partes* hearing.

[2] With respect to the allegation of misrepresentation, the Court saw no reason to believe that the plaintiffs' affidavit was innacurate or misleading in material aspects when the *ex parte* application was made.

[3] On the question of balance of convenience the Court found that the balance was in favour of continuing the injunction against the 1st defendant until the trial of the action as the Court was of the view that if the plaintiffs succeeded at the trial, they would not be adequately compensated by an award of damages for any loss suffered as a result of the 1st defendant controlling and managing the 1st and 2nd plaintiffs.

[4] The Court was satisfied that the plaintiffs had a strong *prima facie* case. Actual or potential damage to the plaintiffs was very serious and the Court did not doubt that the defendants were in possession of vital materials which they may dispose of. The Anton Pillar order was properly granted and there was no reason to set it aside.

[5] The appointment of the interim receivers was justified in law and should continue as the management of the 1st and 2nd plaintiffs under the control of the 1st defendant and his associates was in a serious state and the plaintiffs feared that the running of the companies by the defendants could be detrimental to their interest.

[1st defendant's application dismissed with costs to be taxed and paid forthwith].

Cases referred to:

Ali and Fahd Shobokshi Group Ltd. v. Moneim [1989] 1 WLR 710 ***(cit)***

Khoo Cheng Yee v. Khoo Teng Seong [1992] 1 AMR 47 ***(cit)***

Salcon Engineering Sdn. Bhd. v. PRM Energy Systems Malaysia Sdn. Bhd. [1993] 2 AMR 34 ***(refd)***

Third Chandris Shipping Corporation & Ors. v. Unimarine S.A. [1979] 2 All ER 972 ***(refd)***

Bank Mekar v. Mohamad Ebrahim Nikpom [1982] Com LR 158 ***(refd)***

Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors. [1985] 2 MLJ 236 ***(foll)***

Pan Asian Services Pte. Ltd. v. European Asian Bank AG [1989] 3 MLJ 385 ***(foll)***

American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 ***(refd)***

Hwang Chin Hors v. Song Seng Sdn. Bhd. [1990] 2 MLJ 105 ***(cit)***

Federal Transport Service Co. Ltd. v. Abdul Malik [1973] 1 MLJ 216 ***(cit)***

For the plaintiff - Narayanan; M/s. Riza Leong & Partners

For the defendant - N. Balan; M/s. Paul Ong & Associates

JUDGMENT

Dr. Zakaria Bin Mohamed Yatim J:

This is an application by the first defendant for an order that:

(a) the order of the Court dated 19 November 1991 be set aside;
(b) an order be made for damages to be assessed;
(c) the plaintiffs be required to pay the costs of this application; and
(d) any other relief that the Court may deem fit.

The order dated 19 November 1991 was granted *ex parte* on the application of the plaintiffs.

The first part of the order is an Anton Pillar Order requiring the defendants, their servants or agents to permit the plaintiff's solicitor and

three other persons to enter the premises of the first and second defendants and the offices of the first and second plaintiffs and other premises or vehicles for the purpose of searching for and removing into the custody of the plaintiff's solicitors all documents relating to the case. The order also requires the defendants to disclose the whereabout of all documents, the names and addresses of all persons to whom the defendants have supplied any documents. The defendants were also required, within 24 hours of the service of the order, to deliver into the custody of the plaintiff's solicitors all documents the defendants are required to disclose.

The second part of the order is an injunction restraining the defendants from acting as or holding themselves out or exercising any of the functions or performing any of the duties of the directors or officers of the first plaintiff and from interfering in the management, control, affairs and business of the first plaintiff under the Extraordinary General Meeting of the first plaintiff or until further order.

The third part of the order appoints an interim receiver to manage the affairs of the first plaintiff. His duties are specified in the order.

The first plaintiff is a wholly owned Bumiputra company incorporated in Malaysia and having its registered office at Lot 28, Jalan 223, Section 51A, 46100 Petaling Jaya, Selangor (hereinafter referred to as "Lori Malaysia"). The second plaintiff is also a wholly owned Bumiputra company incorporated in Malaysia and having its registered office at 16th Floor, West Block, Wisma Selangor Dredging, No.142-C, Jalan Ampang, 50450 Kuala Lumpur (hereinafter referred to as "Technivest") and the beneficial owner of 10,475,980 shares representing 98.51% of the total issued paid up capital of Lori Malaysia. The third, fourth, and fifth plaintiffs are individuals - they were as at July 1991 directors of Lori Malaysia and Technivest. The three of them jointly held 765,603 shares in total issued shares of Technivest of 1,595,006 shares of RM1 each constituting 52.38% majority controlling shares of Technivest, which company in turn has 98.51% majority control of Lori Malaysia. The remaining shares in Technivest are owned by one Aziz bin Mustappa, who is not a party to this suit.

The first defendant is a non-Malaysian businessman and has an address for service at TO35, Third Floor, Sungai Wang Plaza, Jalan Sultan Ismail, 50250 Kuala Lumpur. The second defendant is an advocate and solicitor of the High Court Malaya and is practising under the name and style of a legal firm Syarikat Lek Yan and having an address of service at 10th Floor, Hongkong Bank Building, No. 2, Lebuh Ampang, 50100, Kuala Lumpur. The third and fourth defendants are business men having an address at c/o No. 28, Jalan 223, Jalan 51A, Jalan Semangat, 40070 Petaling Jaya.

At the hearing of the application Mr. S.N. Balan, Counsel for the first defendant, submitted that the plaintiffs were not entitled to have the order continued by reason of material non disclosure and by reason of misrepresentation. On the question of non disclosure he cited *Ali and Fahd Shobokshi Group Ltd. v. Moneim* [1989] 1 WLR 710 which was relied upon in *Khoo Cheng Yee v. Khoo Teng Seong* [1992] 1 AMR 47. He said that Ali and Fahd was not followed in *Salcon Engineering Sdn. Bhd. v. PRM Energy Systems Malaysia Sdn. Bhd.* [1993] 2 AMR 34.

Mr. Narayanan, Counsel for plaintiffs submitted that he did not believe that there was non disclosure or misrepresentation in the present case.

I shall now consider the law regarding the question of non disclosure when an *ex parte* injunction is made

In *Ali and Fahd* case, Mervyn Davis J. decided that since the non disclosure in that case could not be regarded as innocent and the *ex parte* order could not properly have been granted if full disclosure had been made and he refused to continue the mareva injunction. *Ali and Fahd* case was followed by Lim Beng Choon J. in *Khoo Cheng Yee v. Khoo Teng Seong & 3 Ors.* where the learned Judge said "... material non-disclosure must *ipso facto* entitle the defendants to have the *interim injunction* set aside..." On the other hand Anuar J. in *Salcon Engineering Sdn. Bhd. v. PRM Energy Systems (M) Sdn. Bhd.* refused to follow *Ali and Fahd*'s case.

After hearing the arguments of both Counsel, I ruled that whether the evidence was disclosed or not at the *ex parte* stage the Court would decide on the application based on all the evidence before it at the *inter partes* hearing.

I think Mervyn Davis J. in *Ali and Fahd* case and Lim Beng Choon J., took a very rigid view

on the issue of non disclosure. It is no doubt an important requirement that the plaintiff should give full and frank disclosure of all matters in his knowledge which are material for the Judge to know. *Third Chandris Shipping Corporation & Ors. v. Unimarine S.A.* [1979] 2 All ER 972. In *Bank Mekar v. Mohamad Ebrahim Nikpom* [1982] Com. LR 158, the plaintiffs argued that the non disclosure was innocent and that there was no fraud or deception. Lord Denning, MR accepted this argument. He said:

> There may sometimes be a slip or mistake - in the application for a *Mareva* injunction in which can be rectified later. It is not for every omission that the injunction will be automatically discharged. A *locus pentitentiae* may sometimes be afforded...

In *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors.* [1985] 2 MLJ 236, I said at page 241:

> Even if the evidence was available at the time of the *ex parte* applications for Mareva injunctions or an **Anton Pillar** Order but the evidence was not presented to the Judge then, in my opinion the plaintiff is not estopped from introducing such evidence during the *inter partes* proceeding.... There are indeed decided cases where further evidence has been introduced in *inter parte* injunction proceedings or in **Mareva** cases. In *Lian Keow Sdn. Bhd. & Anor v. Overseas Credit Finance (M) Bhd. & Ors.*, the appellants obtained, upon an *ex parte* application, from Anuar J., an interlocutory injunction against the first and second and third respondents. The second respondent filed an application to set aside the injunction and the application was heard by Yusoff J. The learned Judge allowed the application and set aside Anuar J.'s order. The appellant appealed against the order of Yusoff J. In its judgment the Federal Court said:
>
> > Whatever complaint could be made regarding lack of opposing affidavits and arguments in this case, surely when the matter came before Yusoff J. all these affidavits and arguments were before him. He should therefore decide the matter on the basis of those affidavits and arguments which were before him, and not to decide it on the basis of materials available before Anuar J.
>
> In *Third Chandris Shipping Corporation and Others v. Unimarine SA*, the English Court of Appeal allowed further evidence to be adduced before it in deciding a **Mareva** case. Similarly in *Hadmor Productions Ltd. & Ors. v. Hamilton & Anor.*, the House of Lords recognized that further evidence may be adduced in considering whether interlocutory injunctions should be granted or not.

The above passage was followed by the Singapore Court of Appeal in *Pan Asian Services Pte. Ltd. v. European Asian Bank AG* [1989] 3 MLJ 385 @ 391. In that case the Singapore Court of Appeal said that when an *ex parte* application for a **Mareva injunction** was made the applicant should make full and frank disclosure of all material facts. However further evidence could be introduced during the *inter partes* proceedings even if the evidence was available at the time of the *ex parte* application but was not presented to the Judge therein. In the appropriate case, the Judge hearing the *inter partes* case from the *ex parte* application could find that further evidence had rectified the earlier deficiency and refuse to discharge the *ex parte* order. In that case the Court of Appeal set aside an *ex parte* order appointing a provisional liquidator on the ground that the "affidavit was hopelessly inaccurate and misleading in material aspects...". I respectfully agree with the principle laid down in that case on the question of non-disclosure. In my opinion that principle applies to the present case even though that case was concerned with an *ex parte* order appointing a provisional liquidator.

In support of his contention on misrepresentation, Mr. N. Balan merely referred to the various allegations made by the plaintiff against the first defendant in the plaintiff's affidavits. In fact in his submission he was refuting the allegations. I have no reason to believe that the plaintiffs' affidavit was hopelessly inaccurate and misleading in material aspects when the *ex parte* application was made.

I shall now consider whether the injunction and the Anton Piller Order granted *ex parte* should be continued until the trial of the action or should be set aside.

The plaintiff's case as pleaded in the statement of claim is that the principal assets of Lori Malaysia are (a) $2^1/_2$ acres of land with a building thereon (the said land); (b) about 300 "Class A" lorry permits for carriage of goods; and (c) about 114 lorries with trailers (the vehicles). The principal liabilities of Lori Malaysia are outstanding loans to various financial institutions totalling RM30 million. The financial institutions are Arab Malaysian Finance Bhd. (AMFB), Arab Malaysian Merchant Bank Bhd. (AMMB),

Arab Malaysian Credit Bhd. (AMCB) [hereafter referred to jointly as "AMMB Group"], Maybank Finance Bhd., Kwong Yik Finance Bhd., Asean Leasing Bhd., and Kewangan Usaha Bersatu Bhd. Part of the said loans are secured by a lease agreement on vehicles and part of it are secured by personal guarantees of the third, fourth and fifth plaintiffs together with one Mustapha bin Hamat.

In early 1991 the financial institutions in particular the AMMB Group demanded payment of the outstanding loan sums and sought to enforce the personal guarantees. The third, fourth and fifth plaintiffs were desirous of selling Lori Malaysia and Technivest to someone who would be in a position to restructure the transport company and release them of their personal liabilities. In July 1991 the first defendant approached the third, fourth and fifth plaintiffs to purchase the controlling shares in Technivest and consequently Lori Malaysia representing *inter alia*:

(a) that he had financial back up and had direct connections with Saudi Arabian Royalties and business tycoons in the Middle East;
(b) that he had substantial deposits amounting to US$100 million in Singapore;
(c) that he had substantial connections with local and international financial institutions and should have no problems for the take over and restructuring Lori Malaysia's loans.

As a prerequisite for him to take over the shares of Technivest and Lori Malaysia and its liabilities, the first defendant required that he be given full and complete control of the Board and of the management of Lori Malaysia and Technivest for a period of 60 days, during which time he would personally assume all liabilities for Lori Malaysia and Technivest; he would inject additional cash into Lori Malaysia amounting to not less than RM3 million. The first defendant ensured that at the end of the 60 days, the personal guarantees of the third, fourth and fifth plaintiffs to the financial institutions for the said sum of RM30 million would be cancelled in full and thereby releasing the third, fourth and fifth defendants of any financial burden.

In July 1991, in consideration of the payment of RM1, and in consideration of the undertaking given by the first defendant, the third, fourth and fifth plaintiffs agreed that all the 100% shares in Technivest and consequently in Lori Malaysia be transferred to the first defendant without any further payment. A sale and purchase agreement prepared by the second defendant was executed by the third, fourth and fifth plaintiffs in August 1991. On 25 July 1991 the control of the Boards and Management of Technivest and Lori Malaysia was handed over to the first defendant and the third, fourth and fifth plaintiffs resigned as directors of both the Companies. Consequently, the second defendant, who prepared the agreement, the third and fourth defendants were appointed to the Board of the two Companies.

Since 25 July 1991 when the first defendant was given the control and management of Technivest & Lori Malaysia no arrangements were made with the said financial institution to cancel the personal guarantees of the third, fourth and fifth plaintiffs, no sum of RM3 million had been injected into the two companies, and the first defendant's financial standing and, banking were ascertained to be untrue. In October 1991, the first defendant was arrested by police on suspicion of various commercial offences. His position as chief executive of Lori Malaysia was terminated and his place was taken over by the third defendant. In the meantime the third, fourth and fifth plaintiffs asked the second defendant for a copy of the said agreement but they did not get a copy of the agreement. The plaintiffs allege that the first defendant had failed to comply with his obligations under the said agreement.

The plaintiffs aver that the third, fourth and fifth plaintiffs are still the registered and controlling shareholders of Techinivest and consequently controlling shareholders of Lori Malaysia. The Board and the management of the two companies are in the hands of the first defendant and his associates, the second, third and fourth defendants. The plaintiffs allege that the first defendant and his associates have taken a course of conduct which is detrimental to the plaintiffs.

The first defendant, in his statement of defence denies that he had financial back up or any direct connections with Saudi Arabian Royalties and business tycoons in the Middle East. He says that he was merely employed in Saudi Arabia by a company named Ditco. He also denies he has US$100 million deposited in Singapore. He denies that he has financial

backing from London. He denies that the personal guarantees of the third, fourth and fifth plaintiffs would be released within 60 days. He says that he gave the assurance for 60 days plus 28 days and that the amount was not RM30 million but RM27 million. He further denies that there was an arrangement for him to secure the release of the personal guarantees of the third, fourth and fifth plaintiffs from the financial institution. He disputes that the third, fourth and fifth plaintiffs were the controlling shareholders of Technivest and Lori Malaysia. The first defendant denies that he was to inject RM3 million into Lori Malaysia.

After considering the statement of claim and the statement of defence of the first defendant and the affidavits, I find that there are substantial triable issues in this case. The first defendant denies the plaintiff's allegation about the RM3 million to be injected into Lori Malaysia. In a memorandum of understanding executed between Technivest and the first defendant, on 25 June 1991 (Enclosure 23 exhibit D1) the first defendant agreed to "deposit in a local bank or with a stake holder in a fix account with his accountants in the sum of RM3 million ... to show good faith in the participation of the company."

On the question of balance of convenience I find that the balance is in favour of continuing the injunction against the first defendant. On 1 September the first defendant wrote to his solicitors instructing the solicitor to register "the 52.35% of Technivest shares in the name of my wife Siti Saleha bt. Sastero ... as my nominee ..." (Enclosure 33 paragraph 3 at exhibit A). If the plaintiffs succeeds at the trial, I do not think that they will be adequately compensated by the award of damages for any loss suffered as a result of the first defendant controlling and managing Technivest and Lori Malaysia. See *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 @ 408.

In the circumstances, I decided that the injunction should continue until the trial of the action.

With regard to the Anton Piller order, Mr. S. Nanthabalan, in his written submission at page 20, merely asked the Court to "critically analyse the opposing affidavits..." without identifying the affidavits, the relevant paragraphs and the relevant exhibits if any.

In the statement of claim and in the affidavit in support (Enclosure 2) of the *ex parte* application, the plaintiffs say they were unable to get a copy of the agreement executed by the third, fourth and fifth defendants. There are documentary evidence in the possession of the first and second defendants which the plaintiffs were unable to get. In paragraph 26 of Enclosure 2, the third plaintiff averred that unless the plaintiffs were given an order to have the documents in the possession of the defendants removed into the custody of the plaintiffs a fair trial of the action would be rendered impracticable.

After considering the pleadings and the affidavit evidence, I am satisfied that the plaintiffs have a strong *prima facie* case. Actual or potential damange to the plaintiffs is very serious. I have no doubt that the defendants are in possession of vital materials which they may dispose of so as to defeat the end of justice. In my opinion the Anton Pillar Order was properly granted and I find no reason why it should be set aside. The plaintiffs have satisfied all the requirements for an Anton Pillar Order. See *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman* [1985] 2 MLJ 236 @ 249.

Mr. Nanthabalan submitted that the injunction was couched in prohibitory terms and in effect was mandatory in nature. With respect, the order for the interlocutary injunction is a plain restraining order. The injunction is not a mandatory injunction.

In the Anton Pillar Order, the defendants were ordered to deliver to the plaintiffs' solicitors, all articles and documents. This is clearly part of the Anton Pillar order.

With regard to the appointment of the interim receivers, I think his appointment was justified in law and should continue. As already stated the plaintiffs have a strong *prima facie* case against the defendants. The management of Technivest and Lori Malaysia under the control of the first defendant and his associates is in a serious state, and the plaintiffs fear that running of the companies by the defendants could be detrimental to their interest. See *Hwang Chin Hors v. Song Seng Sdn. Bhd.* [1990] 2 MLJ 105; and *Federal Transport Service Co. Ltd. v. Abdul Malik* [1973] 1 MLJ 216.

For the reasons stated above, I dismissed the first defendant's application (Enclosure 24) with costs to be taxed and paid forthwith.